No. 06-259

Supreme Court, U.S.
FILED
SEP 25 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

DAVID G. HOUSLER, JR.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission of a criminal defendant's own statements, parts of which the prosecution believed to be false but which it did not urge the jury to accept as true, violates Due Process.

2. Whether it violates Due Process to prosecute two co-defendants for the murder of four fast-food restaurant employees during a robbery by prosecuting one defendant on the theory that he robbed the restaurant and shot the victims, and subsequently prosecuting the other defendant on the theory that he was a lookout in the parking lot of the restaurant during the robbery.

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The May 19, 2006, opinion of the Tennessee Supreme Court, which affirmed the petitioner's convictions and sentences, is reported at 193 S.W.3d 476 (Pet.App. A) The February 27, 2004, opinion of the Court of Criminal Appeals, which affirmed the petitioner's convictions and sentences, is not reported. (Pet.App. O)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner David Housler and his co-defendant, Courtney Mathews, were each tried and convicted, in separate trials, of felony murder for the deaths of four employees of a Clarksville, Tennessee, Taco Bell restaurant during a robbery. Mathews was convicted as the shooter of the four victims inside the restaurant; petitioner was convicted as the lookout positioned outside in the parking lot during the robbery.

At 7:20 a.m. on January 30, 1994, John Ballard, a shift manager at the Taco Bell on Riverside Drive in Clarksville (T.E. X. 70-72), arrived to open for the day. He noticed that employee cars were still in the lot from the night before. (T.E. X. 93-94) When Ballard had stopped by the restaurant at approximately 1:45 a.m. that morning, the employees had been engaged in normal closing activities. (T.E. X. 76-78) After unlocking the main entrance, Ballard entered the building and saw a body near the back of the building in the dish area. (T.E. X, 99) He left and phoned police. (*Id.*)

Clarksville Police Officer Tony Blakely arrived, checked the building, and found the bodies of four Taco Bell employees inside: Kevin Campbell, Angela Wyatt, Patricia Price, and Marcia Klopp. The body of Kevin Campbell was found by the men's restroom, in the corner near a door. (T.E. XI. 143) The second victim, Angela Renea Wyatt, was nearby under a stainless steel sink. (T.E. XI. 145-47) A few feet away, Blakely discovered the body of Patricia Price. (T.E. XI. 148) Just outside the office was the fourth victim, Marcia Klopp, the shift manager. (T.E. XI. 150) All of the victims had died from multiple gunshot wounds. (T.E. X. 112-136; Exs. 7-10)

Authorities recovered evidence that the Taco Bell had been robbed. The office safe had been broken into (T.E. XI. 210, 212-213), and it was determined that $2,967.68 had been taken from the store. (T.E. XI. 169-70) T.B.I. Agent Dan Royse recovered twenty-four .9 mm cartridge cases and eight bullets from the scene (T.E. XIII. 166-70), as well as a fired and unfired shotgun shell case and small lead fragments. (T.E. XIII. 188) Royse later concluded that the shotgun had been used to blow open the safe. (T.E. XIII. 190-91) Tiles in the ceiling of the men's and women's restroom were displaced (T.E. XI. 203), and fingerprints were lifted from a ceiling vent cover and a door jamb in this area. (T.E. XI. 230)

On that same morning, January 30, 1994, David Rose, an employee of a nearby McDonald's restaurant, while emptying trash outside the restaurant, found a bag containing shotgun shells, .9mm shells, a black leather glove, a black wallet, and change in wrappers. (T.E. XI. 181) Clarksville Police Officer John Hunt, while later searching for evidence along Interstate 24 in the area of Taco Bell, found a black coat on an embankment by the Red River bridge. (T.E. XII. 8-9, 11-12) A spot of blood on the hood of the coat was shown by DNA

analysis to be that of the victim Kevin Campbell, to a degree of accuracy of approximately one in thirty thousand persons. (T.E. XI. 236)

On the evening before, January 29, 1994, Courtney Mathews, another employee of Taco Bell, arrived home from work at approximately 7:30 p.m. and went immediately into his room. (T.E. XIII.249; XIX, 97) His roommate, Carl Ward, saw him break down his shotgun and place it, as well as a .9mm and a .25 caliber handgun, into a black book bag with shells. (T.E. XIII. 249) Mathews dressed in layered clothing, including a three-quarter-length black coat. (T.E. XIII. 251) Ward later identified the coat found by the Red River bridge as Mathews'. (T.E. XIII. 252) Mathews left his home approximately forty-five minutes later, with the book bag and a bowling bag, and told Ward and a group at his house that they would not see the clothes again. (T.E. XIII. 251, 260-61) While out driving to the store shortly thereafter, Ward saw Mathews driving down the road. (T.E. XIII. 254)

A week before the robbery and murders at Taco Bell, James Bowen saw Mathews talking to the petitioner, David Housler, at a party held at a trailer in Oak Grove, Kentucky. (T.E. XIV. 114; XIII. 231; XIV. 11, 62) They were discussing a robbery at Taco Bell. The two argued over who would actually "pull the gun," with the petitioner insisting that he should be the one to do it. (T.E. XIV. 114, 118, 125) Mathews proposed robbing Taco Bell because he worked there and knew when it closed and how many people would be there. (T.E. XIV. 117)

On February 2, 1994, T.B.I. Agent Anthony Clark searched Mathews' home and recovered several bullet fragments and unspent rounds. (T.E. XIII. 147-149) One of the live cartridges recovered from Mathews' home was

determined to have been extracted from the same gun that fired the .9mm cartridge cases at Taco Bell (T.E. XIII. 173), and a cartridge case recovered at Mathews' home was determined to have been fired from the same firearm as well. (T.E. XIII. 175) A jacket fragment from Mathews' home was fired from the same gun that fired the eight bullets at Taco Bell (T.E. XIII. 174), and a bullet and fragments recovered from the bodies of two of the victims were fired from the same gun as a bullet recovered from Mathews' home. (T.E. XIII. 179-181) In addition, the fingerprints lifted from the fan vent and door jamb at Taco Bell were identified as Mathews'. (T.E. XII. 34, 50-51) A bowling bag recovered from the back seat of Mathews' car was found to contain $2,576 in small bills. (T.E. XI. 221-22)

In March 1994, petitioner was interviewed by T.B.I. Agent Jeff Puckett. He told Puckett at that time that he was at the "party trailer" in Oak Grove on the night of the murders and denied ever meeting Courtney Mathews. (T.E. XVI. 70, 71) Petitioner spoke to Puckett again on March 21, 1994. At that time, he admitted having met Mathews at the trailer on January 21, 1994, and that Mathews said he had a place to rob. (T.E. XVI. 77) Petitioner heard Mathews say that he would not leave any witnesses — "we'll 187 them." (*Id.*) On October 10, 1995, petitioner spoke again with Puckett and with members of the district attorney's office. (T.E. XVI. 80-81) While reviewing his previous statement, petitioner said that he was the one who "gassed Mathews up" about the robbery and that he told Mathews that if he had "the balls" or would "grow the balls" to go, he, Housler, could be talked into going with him. (T.E. XVI. 82) On October 20, 1995, pursuant to a proffer agreement between petitioner and the district attorney's office, petitioner provided authorities with a detailed, signed statement in which he indicated that he

had been present at the Taco Bell, driving his own car, and sitting outside as a lookout. (T.E. XV. 244; XVI. 94-109)

Among the details petitioner included in this signed statement was that his girlfriend, Sulyn Ulganca, had been with him at the Taco Bell. After Ulganca denied this to authorities (T.E. XV. 248) and petitioner declined to confront her, his agreement was deemed breached, and he was subsequently indicted. (XV. 250)

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE TENNESSEE SUPREME COURT THAT THE ADMISSION AT TRIAL OF PETITIONER'S OWN STATEMENTS DID NOT VIOLATE HIS RIGHT TO DUE PROCESS DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Beyond cavil, and long established by prior decisions of this Court, is the principle that it violates due process for the prosecution knowingly to use false evidence in order to obtain a conviction. *See Mooney v. Holohan*, 294 U.S. 103 (1935). Petitioner asserts that the Tennessee Supreme Court has in this case "carv[ed] an exception to" and "qualified" *Mooney* and its progeny, but it has not. Instead the Tennessee Supreme Court simply found that these cases "are distinguishable from, and not applicable to, the present case." (Pet.App.A 18a) And rightly so — *Mooney* and its progeny do not apply here, and thus the state court decision does not conflict with those decisions, for two important reasons.

First, the false evidence at issue here consists of *petitioner's own statements* — not the testimony or other evidence provided by a *witness*. *Cf. Giglio v. United States*,

405 U.S. 150 (1972) (witness' perjured testimony); *Napue v. Illinois*, 360 U.S. 264 (1959) (same); *Alcorta v. Texas*, 355 U.S. 28 (1957) (same); *Pyle v. Kansas*, 317 U.S. 213 (1942) (same); *Mooney*, 294 U.S. 103 (same). The Tennessee Supreme Court cited decisions of this Court for the proposition that the confession of a criminal defendant, assuming that it is voluntarily made and sufficiently corroborated, is admissible in evidence. (Pet.App.A 19a) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963); *Smith v. United States*, 348 U.S. 147 (1954); *Opper v. United States*, 348 U.S. 84 (1954)) *See Lego v. Twomey*, 404 U.S. 477, 483 (1972). Petitioner thus asks this Court to entertain something of a paradox: that he lied to authorities regarding the details of his involvement as a lookout for the robbery; that those lies were ultimately used against him in court; and that this use of his own lies against him violated his right to due process.

This cannot be right. The statements made to investigators by a criminal defendant are often a staple of the prosecution's case, and, contrary to petitioner's assertions, experience shows that such statements are often full of lies — misstatements, exaggerations, minimizations, deceptions, embellishments, etc. A rule that would prohibit the use of such statements, or require prosecutors to sift through them and proffer only those parts they believed, would be completely unworkable. But in any event, *Mooney* and its progeny simply do not support the illogical proposition advanced by petitioner. As the Tennessee Supreme Court observed, "the concerns that animated [this] Court's decisions in *Mooney* and its progeny differ significantly from concerns that arise with the use of the defendant's own statements" (Pet.App.A 18a) — an observation that alludes to reason number two.

The essence of the due process violation contemplated by *Mooney* and *Napue* and like cases, and the unstated assumption of the principle that the prosecution may not knowingly use false evidence to obtain a conviction, is the prosecution's use of the falsehood to deliberately *deceive* the court and the jury and thereby *contrive* a conviction — in other words, the prosecution's presenting the jury with the falsehood *as if it were the truth*. *See Mooney*, 294 U.S. at 112 (due process denied "if a state has contrived a conviction . . . through a deliberate deception of court and jury"); *Napue*, 360 U.S. at 269 (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y.App. 1956)) (prosecutor who knows witness has lied has "duty to correct what he knows to be false and elicit the truth"). *See also Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 2409 (2005) (Souter, J., concurring) (noting that claim at issue was not "that the prosecution deliberately deceived or attempted to deceive [the] trial court, as in *Mooney*"). Here, the prosecution did no such thing. As the State pointed out to the Tennessee Supreme Court, petitioner cannot point to any instance in which the prosecution urged the jury to accept as true any part of his statement that it believed to be false. And the court so found: "[T]he prosecution did not attempt to corroborate known falsities that the confession contained, but rather only those portions that it believed were true." (Pet.App.A 24a) Indeed, the prosecution expressly stated to the jury that "[i]t never ever has been the contention of the State that every line, every sentence in [petitioner's] statement . . . is true." (T.E. XXI. 95)

And this second point leads in turn to yet another reason for this Court to deny review here. While the prosecution certainly *disbelieved* many of the details contained in petitioner's statement, it lacked the kind of *knowledge* of falsity necessary to give rise to a due process violation, even

if it *had* presented such details as true. Before the Tennessee Supreme Court, the State merely assumed *arguendo* that the prosecution "knew" that portions of petitioner's statement were false.[1] While the Tennessee Supreme Court nevertheless saw fit to "recognize that [petitioner's] confession contained many known factual falsehoods" (Pet.App.A 19a), the "knowledge" contemplated by the court was merely that gained from an evaluation of the overall state of the evidence in the case. *See* Pet.App.A 19a ("In this case, the *evidence* demonstrates the falsity . . . of many peripheral facts in Housler's statement.") (emphasis altered). Such "knowledge" is vastly different from that possessed by the prosecution in *Mooney*, *Alcorta*, *Napue*, and the like. *See, e.g.*, *Giglio*, 405 U.S. at 152 (witness testified that no promises were made by prosecution for his testimony, but a prosecutor had in fact made such a promise); *Napue*, 360 U.S. at 267 (same); *Alcorta*, 355 U.S. at 31 (witness testified to innocent relationship with defendant's wife after previously telling prosecutor he had been intimate with her). Indeed, in petitioner's effort to illustrate for this Court "the particular known false facts" in his own statement, he points to the evidence presented at the trial of his co-defendant, Mathews. (Pet. 21) Petitioner's claim, then, that the prosecution knowingly presented false evidence ultimately amounts to little more than a variation on his claim that the prosecution presented inconsistent theories and evidence at the two trials. *See* discussion in Section II, *infra*. And as the Tennessee Supreme Court observed with respect to that latter claim,

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[1] At the same time, however, the State pointed to a state investigator's testimony as providing a more apt characterization. *See* T.E. XVII. 162 (Agent Puckett testified that "[p]ortions [of petitioner's statement] are true and portions are not accurate and portions are uncorroborated. . . . There are portions in there that I think are untrue.").

while prosecutors are duty-bound not to present evidence that they know to be false, in the end, "prosecutors are not finders of fact." (Pet.App.A 27a).

The Tennessee Supreme Court determined that petitioner's statements were voluntary — a point he no longer disputes. (Pet.App.A 21a) And they were sufficiently corroborated so as to be admissible. (Pet.App.A 23a) Due process demands no more. The ultimate question regarding the truth or falsity of petitioner's statements was properly left to the determination of the jury. *See Lego*, 404 U.S. at 484-485. Because the state court decision on this issue does not conflict, but instead fully comports, with this Court's prior decisions, certiorari is unwarranted on this question.

II. THIS CASE PRESENTS NO IMPORTANT FEDERAL QUESTION FOR THIS COURT TO SETTLE REGARDING THE PRESENTATION OF INCONSISTENT THEORIES, BECAUSE THE PROSECUTION PRESENTED ENTIRELY CONSISTENT THEORIES AT THE RESPECTIVE TRIALS OF PETITIONER AND HIS CO-DEFENDANT, COURTNEY MATHEWS.

In *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398 (2005), the prosecution had presented inconsistent theories at the respective trials of two co-defendants charged with murder. In proceedings on Stumpf's guilty plea and sentencing, the prosecution asserted that, while he and a co-defendant, Wesley, were robbing a couple in their home, Stumpf shot and killed one of the victims. At the subsequent trial of Wesley, however, the prosecution asserted that Wesley was the shooter. Vacating a Sixth Circuit judgment that Stumpf's due process rights had been violated by the presentation of these inconsistent theories, this Court

concluded that there had been no due process violation. Because both men could be guilty of murder regardless of who actually killed the victim, the Court held that "the precise identity of the triggerman was immaterial to Stumpf's conviction." *Id.*, 125 S.Ct. at 2407.

Deciding this case with the benefit of *Stumpf*, the Tennessee Supreme Court did not need even to address the due process question; it concluded instead that "*the State did not pursue inconsistent prosecutions at Mathews' and the [petitioner's] respective trials.*" (Pet.App.A 25a) (emphasis added) "[I]n fact, the core theory of the two prosecutions was consistent — namely, that Mathews shot the victims and robbed the store, while [petitioner] served as a lookout. These two theories obviously are not irreconcilable." (Pet.App.A 27a)[2] To the extent that inconsistencies did exist, they "did not exist at the core of the prosecutors' cases." (Pet.App.A 26a-27a) They related instead to the peripheral details regarding Mathews' and petitioner's involvement in the robbery and murders (Pet.App.A 19a), and, thus, were immaterial. *See* Pet.App.A 27a ("How Mathews and Housler arrived at the Taco Bell on the night of the murders is immaterial to their guilt, ...") *See also Stumpf*, 125 S.Ct. at 2407.

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[2] Petitioner relies on the conclusions drawn in this respect by the trial judge, but these are superseded by the conclusions of the Tennessee Supreme Court. Indeed, the Tennessee Supreme Court expressly found that "[petitioner's] 'lone perpetrator' characterization of Mathews' prosecution is demonstrably false," (Pet.App.A 25a), thus impliedly rejecting the trial court's conclusion to the contrary. *Cf.* Pet. 27 (pointing to "the finding[] of the trial judge that the *Mathews'* prosecution [was] sole perpetrator/lone actor").

Furthermore, the source of most of these inconsistencies was petitioner's own statement, which "contained numerous falsehoods that contradict evidence presented at Mathews' trial" (Pet.App.A 26a), and which, again, the prosecution did not wholly embrace. *See* T.E. XXI. 103 (prosecution argued to jury that "[i]t doesn't make any difference . . . as far as the guilt or innocence is concerned" whether the defendant purchased ammunition, or stopped at a mini-mart on the way to Taco Bell, or rode with Mathews to the Taco Bell).[3] As the Tennessee Supreme Court noted, petitioner certainly pursued this matter at trial, "present[ing] evidence to the jury indicating various inconsistencies in the factual accounts." (Pet.App.A 28a) *See Stumpf,* 125 S.Ct. at 2410 (Thomas, J., concurring) (noting the guarantee of vigorous adversarial testing of guilt and innocence).

Petitioner gives only passing recognition to this Court's decision in *Stumpf,* focusing instead on the Sixth Circuit decision in that case. But while it may not be entirely inaccurate for petitioner to assert that "[t]his Court did not reverse the Sixth Circuit's finding that the use of inconsistent irreconcilable theories to convict two defendants for the same crime is a due process violation" (Pet. 26), it is nonetheless misleading. This Court *did* vacate the portion of the Sixth Circuit judgment holding that Stumpf's due process rights had been violated, thus rendering irrelevant petitioner's assertion that "the Sixth Circuit decision in *Stumpf* and the Supreme Court of Tennessee's decision in this case cannot be

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[3] What *did* make a difference, the prosecution argued further, was whether "[petitioner was] down at Taco Bell in the early morning hours of January 30th . . . and if he was down there, was he down there as a participant in a robbery in which four innocent people were murdered?" (*Id.*)

reconciled." (Pet. 27) There is no conflict with *this* Court's decision in *Stumpf*, and because the state court decided that the prosecution did *not* present inconsistent theories in this case, there is no due process question for the Court to settle. Accordingly, certiorari is unwarranted on this question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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